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No. 93-1248

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ALLEN LANDSDOWN, Individually and as Deputy Sheriff, DALE PENNY, Individually and as Deputy Sheriff,

Cross-Petitioners,

vs.

ANNABELLE WINTERS

Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID W. LEE*
LEE, COLLINS & FIELDS, P.C.
818 N.W. 63rd Street, Suite 100
Oklahoma City, Oklahoma 73116-7699
(405) 848-1983

ATTORNEY FOR CROSS-PETITIONERS

* Counsel of Record

10 pp

QUESTIONS PRESENTED

1. Whether a law enforcement officer, while lawfully on the premises of a pawnshop, a closely regulated industry, was entitled to seize a stolen ring found on the premises, where there was probable cause to believe the ring was stolen, and whether exigent circumstances were required before the ring could be seized.

2. Whether exigent circumstances existed that justified the seizure of the stolen ring from the pawnship premises.

3. Whether the Petitioners Landsdown and Penny[1] violated the clearly established rights of the pawnbroker, and therefore forfeited their qualified immunity when the stolen ring was seized by Landsdown.

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[1]The Cross-Petitioner Pinney's name is misspelled "Penny" in the style of this case. Because the case was dismissed before the correction was made, for the purposes of this Cross-Petition, Pinney will be referred to as "Penny."

RULE 14 STATEMENT

The parties to the proceedings below included the Cross-Petitioners Allen Landsdown and Dale Penny, and the Petitioner Annabelle Winters, a/k/a Sharp's Pawnshop. The other parties were the Board of Commissioners of Osage County, Oklahoma, the Osage County Sheriff's Department, and George Wayman, Sheriff of Osage County, Oklahoma.

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No. 93-1248

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALLEN LANDSDOWN and DALE PENNY,

Cross-Petitioners,

v.

ANNABELLE WINTERS d/b/a
SHARP'S PAWNSHOP,

Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Cross-Petitioners Allen Landsdown ("Landsdown") and Dale Penny ("Penny") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 2, 1993. Rehearing was denied on October 5, 1993. The Petitioner Winters ("Winters") filed a corrected Petition for a Writ of Certiorari, which was received by the Cross-Petitioners on January 27, 1994.

This Cross-Petition is brought pursuant to S. Ct. R. 12.3.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as Winters v. Board of County Commissioners, 4 F.3d 848 (10th Cir. 1993). The memorandum decision of the United States District Court for the Northern District of Oklahoma (Ellison, D.J.) was not reported. It is reprinted in the Appendix A hereto, infra. It affirmed the Report and Recommendation of the magistrate-judge (Appendix B, infra).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, Winters brought this suit in the Northern District of Oklahoma. On February 13, 1992, the Northern District granted summary judgment in favor of all Defendants, which included Landsdown and Penny.

On Winters's appeal, the Tenth Circuit, on September 2, 1993, entered a judgment and an opinion reversing the Northern District's order. Winters disagreed with a portion of the opinion, and requested a petition for rehearing, which was denied on October 5, 1993.

Winters' corrected Petition was received by the Cross-Petitioners on January 27, 1994. This is a Cross-Petition pursuant to S. Ct. R. 12.3.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983 states in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Okla. Stat. tit. 59, § 1508(A) stated as follows:[2]

> At such times as the Administrator [of Consumer Affairs] may deem necessary, the Administrator or his duly authorized representative may make an examination of the place of business of each licensee and may inquire into and examine the transactions, books, accounts, papers, correspondence and records of such licensee insofar as they pertain to the business regulated by this act. Such books, accounts, papers, correspondence, records and property taken, purchased or received shall also be open for inspection at any reasonable time to federal law enforcement officials and the chief of police, district attorney, sheriff, or written designee of the law enforcement body in whose jurisdiction the pawnship is located, without any need of judicial writ or other process.

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[2]The statute was amended in 1992, making only slight changes, a fact noted by the Tenth Circuit in its opinion below. Winters v. Board of County Commissioners, 4 F.3d 848, 851 n.3 (10th Cir. 1993).

STATEMENT OF THE CASE

On November 9, 1988, a ring was stolen from its owner, George Ward, by his niece, Shelly Dean. The Cross-Petitioner Dale Penny, a deputy with the Osage County Sheriff's Office, investigated the theft of the ring, and on December 8, 1988, Penny signed and filed a probable cause affidavit. This caused felony criminal charges to be filed against Shelly Dean, and an arrest warrant to be issued for her arrest in State of Oklahoma v. Shelly Dean, CRF-88-191.

On March 1, 1989, the Cross-Petitioner Allen Landsdown, a deputy with the Osage County Sheriff's Office, went to Winters's pawnshop (which is knows as Sharp's Pawnshop) to check on property with regard to an unrelated burglary. Under an Oklahoma statute, Okla. Stat. tit. 59, § 1508(A), Landsdown was entitled to inspect all pawned goods on the premises of a

licensed pawnshop. While Landsdown was at the pawnshop, Deputy Penny called and told Landsdown that the ring stolen by Shelly Dean was on the premises of the pawnshop.

Acting on instructions from Penny, who, as noted previously, had signed the probable cause affidavit with regard to the ring, the Petitioner Landsdown seized the ring from Winters's pawnshop. The ring was subsequently used as evidence in criminal proceedings in State v. Shelly Dean, CRF-88-191.

On April 14, 1989, a preliminary hearing was held in State of Oklahoma v. Shelly Dean, CRF-88-191. At that hearing, George Ward identified the ring as his.

On August 28, 1989, the thief, Shelly Dean, entered a plea of no contest to the charges in CRF-88-191. During that hearing she was ordered to pay $60.00 in restitution, which was the amount of the

pawn transaction when she pawned the ring at Sharp's Pawnshop on November 9, 1988.

On September 15, 1989, a check in the amount of $60.00 from the Osage County District Attorney's Victim Restitution Fund was issued to Winters as restitution ordered by the court pursuant to the plea of no contest by Shelly Dean. This restitution check was sent to Winters pursuant to the provisions of Okla. Stat. tit. 22, § 991a-3. This check covered the amount paid by Winters's employee to Shelly Dean when she pawned the ring. Winters has refused to cash the check, and it is in the possession of Winters's attorney.

On September 28, 1989, after Shelly Dean's plea, and after the restitution check had been sent to Winters, the ring was returned to its rightful owner, George Ward. It is uncontroverted that Winters is not the owner of the ring.

Winters filed this lawsuit pursuant to 42 U.S.C. § 1983,[3] alleging that the seizure and return of a ring by law enforcement officers violated her rights under the United States Constitution. Landsdown and Penny, the two deputies with the Osage County Sheriff's Office, and the Board of Commissioners of Osage County ("County") filed a motion for summary judgment, and Winters filed a response and cross motion for summary judgment. On May 15, 1991, Magistrate Judge John Leo Wagner issued a Report and Recommendation of U.S. Magistrate Judge, in which he granted all Defendants' (including the Petitioners Landsdown and Penny) motion for summary judgment, and denied Winters' motion for summary judgment (Appendix B, infra). Winters objected to the report of the magistrate judge.

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[3]This is the basis of federal jurisdiction. S. Ct. R. 12.1(i).

On February 13, 1992, the Honorable James O. Ellison affirmed the magistrate judge's report in all respects (Appendix A, infra).

Winters then appealed the granting of summary judgment to the United States Court of Appeals for the Tenth Circuit. On September 2, 1993, the Court of Appeals reversed the district court's opinion in part. Winters v. Board of County Commissioners, 4 F.3d 848 (10th Cir. 1993). The court reiterated its previous holding that the pawnshop was a closely regulated industry in Oklahoma because of state statutes regarding inspections. Id. at 852; S & S Pawnshop v. City of Del City, 847 F.2d 432, 436-37 (10th Cir. 1991). The court also held that because of Okla. Stat. tit. 59, § 1508, the officer was entitled to examine the stolen ring. Winters, 4 F.3d at 854. However, because Landsdown and Penny knew that the stolen ring was on

the premises, the court held that seizure of the ring violated the pawnbroker's rights. Id. at 853-55. The court stated:

> If we were to allow an officer under the guise of the administrative statute to seize evidence of criminal activity without a warrant when the officer has a particularized suspicion regarding that evidence, we would eradicate the Fourth Amendment protections enjoyed by the pawnshop.

4 F.3d at 854.

The court also held that had exigent circumstances existed, the stolen ring could have been seized without a search warrant, but the mere fact that the owner of the ring had announced that he was coming to get the ring was not sufficient to justify the seizure without a warrant. Id. at 854 n.7.

Winters filed a petition for rehearing, which was denied on October 5, 1993.

REASONS FOR GRANTING THE CROSS-PETITION

I. THE COURT OF APPEALS' OPINION, WHICH HELD THAT LAW ENFORCEMENT OFFICIALS, WHO HAVE PROBABLE CAUSE TO BELIEVE THAT AN ITEM THAT IS THE FRUIT OF A CRIME IS ON THE PREMISES OF A CLOSELY REGULATED INDUSTRY, CAN EXAMINE, BUT CANNOT SEIZE SUCH WITHOUT A SEARCH WARRANT, CONFLICTS WITH PREVIOUS OPINIONS OF THE SEVENTH AND FIRST CIRCUIT COURTS OF APPEAL, AND IS INCONSISTENT WITH THIS COURT'S OPINIONS IN SOLDAL v. COOK COUNTY, HORTON v. CALIFORNIA AND ARIZONA v. HICKS.

1. The seizure of the ring from the pawnshop by officers, who had probable cause to believe the stolen ring was the fruit of a crime, did not violate the Fourth or Fourteenth Amendment rights of the pawnshop owner.

In the present case, the Tenth Circuit held that if a law enforcement officer has "particularized suspicion" that an item that is the fruit of the crime is on the premises of a closely regulated industry,

the officer, although entitled to examine the property, cannot seize such unless "exigent circumstances" exist. Winters v. Board of County Commissioners, 4 F.3d 848, 853-55 (10th Cir. 1993).

This holding conflicts with previous opinions of two courts of appeals. In United States v. Cerri, 753 F.2d 61, 62-64 (7th Cir. 1985), a case involving the warrantless seizure of guns and business records from the premises of a federally licensed firearms dealer (obviously a closely regulated industry), the court held that all rooms of the premises could be searched without a search warrant, that no exigent circumstances were required for the seizure, and that the seizuré of the guns and records was legal even though the agents were aware of the illegal nature of the guns on the premises. The court stated that the defendant's argument that the federal firearms inspection statute, 18

U.S.C. § 923(g), was inapplicable when the agents "suspect" criminal conduct, was "frivolous, implying that as it does that the law abiding have fewer rights than criminals." Cerri, 753 F.2d at 64. The court in Cerri also rejected the contention that because the agents engaged in a "pretext" regarding the reentry into the premises, that this invalidated the search. Id. at 63.

This holding is contrary to the Tenth Circuit's opinion in the present case, which held that a "pretext" by law enforcement officers for the purpose of the inspection of the premises of a closely regulated industry prevents them from seizing fruits of a crime found within. Winters, 4 F.3d at 855 n.8.[4]

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[4]Of course, as is discussed in Proposition II, infra, the fact that the Cross-Petitioners suspected that the stolen ring was at the pawnshop, was held by the Tenth Circuit to be a "pretext" which dissolved their qualified immunity protection.

The holding in Cerri is also consistent with that of the First Circuit in United States v. Wilbur, 545 F.2d 764, 766 (1st Cir. 1976), where the court rejected a contention that agents conducting a warrantless search of a closely regulated industry cannot conduct a search of or seize items from a licensed premised when they suspect that illegal activities were occurring there.[5] The court noted that "[a] rule allowing federal agents to conduct a warrantless search of a dealer's premises only until their suspicions were aroused or, as here, the fact established probable cause, would make little sense." Id. at 766.

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[5]In the present case, Winters also possessed a federal firearms license, giving even more justification for the holding that the pawnshop was a closely regulated industry.

Therefore, the Tenth Circuit's opinion in the present case is in conflict with previous rulings from two circuit courts of appeal.

The Tenth Circuit's opinion is also inconsistent with the United States Supreme Court's decision in Horton v. California, 496 U.S. 128 (1990). In the present case, the uncontroverted facts show that probable cause existed for the Cross-Petitioner Landsdown to believe that the ring had been stolen from George Ward. Furthermore, because of the state statute, Okla. Stat. tit. 59, § 1508(A), he was entitled to examine the ring, a fact noted by the Tenth Circuit. 4 F.3d at 854. But the Tenth Circuit held that although the ring could be examined by the officers, it could not be seized unless exigent circumstances existed.

In Horton, this Court ruled that inadvertency was not a requirement for a

plain view seizure. This holding ended years of debate over whether inadvertency had to be shown prior to seizure under the plain view document. See, e.g., Texas v. Brown, 460 U.S. 730, 736-38 (1983) and Coolidge v. New Hampshire, 403 U.S. 443 (1971).[6] In addition to there being no requirement of inadvertence, there is also no suggestion in Horton that exigent circumstances must exist before property can be seized by an officer in a place where he or she has a right to be. In Horton, the Court held that the only requirements for a plain view seizure were that the item be in plain view, and that

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[6]The Tenth Circuit had previously held, in Wolfenbarger v. Williams, 826 F.2d 931, 934-37 (10th Cir. 1987), that for a plain view seizure to be valid, the discovery of the property must be inadvertent. However, in Horton the Supreme Court mentioned Wolfenbarger in its opinion, Horton, 496 U.S. at 132 n.3, and the Horton ruling implicitly overruled Wolfenbarger.

its incriminating nature be immediately apparent. Id. at 136.

However, in the present case the Tenth Circuit held that because of Okla. Stat. tit. 59, § 1508(A), the officer was entitled to examine the stolen ring, but the ring could not be seized. Winters, 4 F.3d at 854. In Horton, no exigent circumstances existed,[7] and, as noted above, there is no suggestion in the Court's opinion that this was required. Exigent circumstances are only relevant to a search in order to justify the invasion of a privacy interest. See Horton, 496 U.S. at 137; Minnesota v. Olson, 495 U.S. 91 (1990); and Payton v. New York, 445 U.S. 573 (1980).

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[7]A reading of the opinion would lead one to believe that the defendant in Horton was not even present when the search took place, and it is apparent that no other exigent circumstances existed.

In Soldal v. Cook County, ___ U.S. ___, 113 S. Ct. 538, 547 (1993) the Court held that while seizures of property are subject to Fourth Amendment limitations, a seizure can be made if there is no invasion of privacy, and if the item's incriminating character is immediately apparent. Again there was no suggestion that "exigent circumstances" must accompany the seizure, as opposed to the intrusion into an area where an individual has a privacy interest. See also Minnesota v. Dickerson, ____ U.S. ____, 113 S. Ct. 2130, 2138 (1993) ("The seizure of an item whose identity is already known occasions no further invasion of privacy.").

In Arizona v. Hicks, 480 U.S. 321, 324-26 (1987), the Court stated that it was the "intrusion" into a protected area that determined whether exigent circumstances were required. Nothing in Hicks suggests that exigent circumstances are required

before an item in plain view can be seized where the incriminating nature of it is readily apparent. Instead, the Court spoke in terms of the probable cause that must exist before the incriminating item can be seized. Id. at 327-28. Exigent circumstances are not required to justify a seizure of property by an officer who is in a place where he or she is entitled to be, and has probable cause to seize the item.

In the present case, there was no invasion of the pawnbroker's privacy because, as the Tenth Circuit conceded, by statute, Deputy Landsdown had a right to examine the property on the premises. Therefore, he should have been permitted to seize it because he had probable cause to believe that it was stolen.

Law enforcement officers should be able to seize items found in a closely regulated industry where there is probable cause to believe the items are fruits of a

crime. Whether an officer knows or suspects that the item is on the premises is irrelevant to whether it can be seized; the only question should be whether the officer had probable cause to believe that the item is the fruit or instrumentality of a crime. Arizona v. Hicks, 480 U.S. at 327-28. To hold otherwise would mean that the suspicion of the officer as to the items's connection to a crime would be the determining factor, which would move away from the probable cause requirement so clearly set forth in Soldal, Horton and Hicks.

This issue of important because of the growing need for law enforcement officers to have full enforcement powers with regard to seizing fruits or instrumentalities of crime on closely regulated industries such as gun dealers' premises. To hold that a law enforcement officer, who suspects that firearms are being possessed on a licensed

gun dealers' premises in a manner that violated the law could not immediately seize those guns, would be to improperly hamper the enforcement of firearm laws.

For example, in United States v. Biswell, 406 U.S. 311 (1972) the Court upheld the warrantless search and seizure of two sawed-off shotguns in a pawnshop having a federal firearms license that were discovered when a federal agent conducted a warrantless inspection pursuant to 18 U.S.C. § 923(g). Whether the agent suspected that there was a violation of federal law by the pawnshop owner when the agent went to the premises appears to be irrelevant to the Court's holding. An agent who inspects the premises of a closely regulated industry should be able to seize goods related to criminal conduct regardless of what knowledge the officer possesses when he arrives at the location.

2. Where the owner of the ring was on his way to pick up the ring, this created exigent circumstances that justified the immediate seizure of the ring, there was no unlawful seizure.

The Cross-Petitioner Landsdown's affidavit in support of his motion for summary judgment stated that when he arrived at the pawnshop, he was advised by Penny by telephone that the ring that had been taken from George Ward's residence had been pawned by Shelly Dean, and was at the pawnshop. In paragraph 5 of his affidavit, Landsdown stated that Penny advised him by telephone that the owner of the ring, George Ward, was coming to the pawnshop to pick up the ring.[8] Landsdown stated that he believed that this was not a good idea

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[8]The Tenth Circuit held that this did not constitute exigent circumstances, because the officers could have placed a "hold" on the stolen property. 4 F.3d at 854 n.7. But there is no authority in Oklahoma for a "hold" and no constitutional requirement that police attempt to have the property held by the possessor of it rather than seize it for preservation.

because the ring was going to be used as evidence against Shelly Dean. Landsdown then seized the ring. The ring was, in fact, used as evidence at the preliminary hearing.

Therefore, exigent circumstances existed which required him to make an immediate seizure of the ring. Because of this, Landsdown was justified in immediately seizing the ring in order to preserve it as evidence for a criminal prosecution. The seizure of it from the pawnshop was, therefore, valid. See Cupp v. Murphy, 412 U.S. 291, 294-96 (1973) (exigent circumstances justified warrantless search of fingernails).

II. THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT WAS NOT SHOWN THAT CLEARLY ESTABLISHED CONSTITUTIONAL LAW WAS VIOLATED BY THE SEIZURE OF STOLEN PROPERTY FOUND ON THE PREMISES OF A CLOSELY REGULATED INDUSTRY.

In the present case, the Tenth Circuit held that the Cross-Petitioners Landsdown

and Penny, who caused the seizure of the stolen ring that was in the possession of the pawnshop owner, were not entitled to qualified immunity. Winters v. Board of County Commissioners, 4 F.3d 848, 855 n.8 (10th Cir. 1993). The court held that although its opinion in S & S Pawnshop Inc. v. City of Del City, 947 F.2d 432, 441 (10th Cir. 1991) (holding that when an officer conducts an administrative search of a pawnshop, if he or she has direct criminal suspicion regarding the existence of evidence of a crime, property cannot be seized), had not been issued when the Cross-Petitioner Landsdown conducted his seizure of the stolen property in the present case, he was still not entitled to qualified immunity. 4 F.3d at 855 n.8. The court remanded the case to determine what Penny's role was with regard to the seizure. 4 F.3d at 855.

The Tenth Circuit's holding that Landsdown and Penny are not entitled to qualified immunity because they had violated clearly established constitutional law was based on a footnote in the case of New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987). The Tenth Circuit in Winters stated that Burger held that the administrative search exception does not apply in cases where "pretext" is involved. 4 F.3d at 855 n.8. But the opinion in Burger only held that "pretext" was not involved in that case. Burger, 482 U.S. 716 n. 716. This is a far cry from holding that if an officer is on the premises of a closely regulated industry to look for goods stolen in a specific burglary, he can examine, but not seize, goods he discovers that are the fruits of an unrelated crime.

Furthermore, the Cross-Petitioner Landsdown's search and seizure was not

based on pretext.[9] He went to the pawnshop because he was investigating an unrelated burglary. While he was there, he was called by Penny and told that the ring stolen by Shelly Dean was at the pawnshop. There was never any indication that he lied about the purpose of the visit.

Because of the holdings of this Court in Horton v. California, 496 U.S. 128 (1990) and Arizona v. Hicks, 480 U.S. 321 (1987), as was discussed above, it was certainly less than clearly established constitutional law that the seizure of the stolen ring on the premises of a closely regulated industry violated the Fourth Amendment. Cf. Siegert v. Gilley, ____ U.S. ____, 111 S. Ct. 1789 (1991) (qualified immunity doctrine applies where

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[9]The American Heritage Dictionary (3d ed.) defines "pretext" as "1. An ostensible or professed purpose; and excuse. 2. An effort or a strategy intended to conceal something."

plaintiff fails to show the violation of a clearly established right); Hunter v. Bryant, ____ U.S. ____, 112 S. Ct. 534 (1991) (Secret Service agents entitled to qualified immunity with regard to arrest even if their judgment was mistaken).

The law is "clearly established" when it is well developed enough and the contours of an asserted right are sufficiently clear to inform the reasonable official that his or her conduct violates the law. Anderson v. Creighton, 483 U.S. 635, 640 (1987). The issue is whether the law was clear in relation to the specific facts confronting the public official when he or she acted. Id. at 639-41. The constitutional right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful. Rios v. Lane, 812 F.2d 1032, 1039 (10th Cir. 1987). See also Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557

(11th Cir. 1993) (court notes that if the case law has not staked out a bright line, qualified immunity almost always protects the defendant); McConnel v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987) ("in cases where there is a legitimate question whether those principles extend to the particular use before the court or whether the particular case might constitute an exception to those principles, the court should sustain a qualified immunity defense").

However, public officials are charged only with keeping abreast of the current state of the law, not with anticipating changes. Bailey v. Board of County Commissioners, 956 F.2d 1112, 1123 (11th Cir. 1992).

In the present case the Tenth Circuit held that Landsdown was entitled to examine the property, but was not entitled to seize it unless exigent circumstances existed.

Winters, 4 F.3d at 854. But in Horton v. California, 496 U.S. 128, 130 (1990), the Supreme Court held that inadvertence was not a requirement for a plain view seizure. A reading of Horton reveals that exigent circumstances are not a prerequisite of a plain view seizure.

In Horton, the Court rejected the "inadvertent discovery" requirement enunciated in the plurality opinion of Justice Stewart in Coolidge v. New Hampshire, 403 U.S. 443 (1971). See Wayne R. LaFave, 2 Search and Seizure: A Treatise on the Fourth Amendment, § 5.3(b) n.67 (Supp. 1993). The Court in Horton held that an officer must not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. 496 U.S. at 137. The Court, however, also held that the only other requirements are that the incriminating character of the evidence must be immediately apparent, and

that the officer have a lawful right of access to the object itself. Id.

As noted in Proposition I, supra, Horton also holds that exigent circumstances are not a prerequisite of a plain view seizure. "Exigency" as an aspect of a plain view seizure was suggested by Justice Stewart in his plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443, 470-71 (1971). See Horton, 496 U.S. at 134-38. But in Horton, the Court noted that Justice Stewart's entire plain view analysis had never commanded a majority, and had "flaws." 496 U.S. at 138. The Court in Horton instead adopted a plain view theory which, as noted above, required neither inadvertence, or exigent circumstances.

The exigent circumstances doctrine is applicable only with regard to whether the police can invade an area where an individual has a reasonable expectation of

privacy, or where there is an intrusion into an area of personal security. See Soldal v. Cook County, ____ U.S. ____, 113 S. Ct. 538, 545-46 (1992) (noting that police can enter a house by the showing of exigent circumstances); Arizona v. Hicks, 480 U.S. 321, 323-26 (1987) (warrantless entry was justified by exigent circumstances); Cupp v. Murphy, 412 U.S. 291, 294-96 (1973) (exigent circumstances justified warrantless search of fingernails); and Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (exigent circumstances justified warrantless entry of house to search for weapons). Cf. United States v. Anderson, 981 F.2d 1560, 1567-68 (10th Cir. 1992) (government failed to establish that exigent circumstances were sufficient to justify warrantless entry). Because the seizure of property involves possessory interests, rather than

privacy interests, whether exigent circumstances exist is irrelevant.

Once there has been a legal entry, the probable cause and "immediately apparent" requirements are the only limitations on a plain view seizure. See LaFave, §§ 6.5 and 6.7 (1987 & Supp. 1993) See also Soldal v. Cook County, ____ U.S. ____, 113 S. Ct. 538, 546 (1992) (noting that police can seize property without a warrant if they meet the probable cause standard; if they come across the property in plain view and unaccompanied by unlawful trespass, no invasion of personal privacy has occurred); and Arizona v. Hicks, 480 U.S. 321, 326 (1987) (stating that an object found in plain view can be seized and taken from premises). In these opinions there is no suggestion that the police, when they are in a place where they are entitled to be, and have probable cause to believe the item is the fruit of a crime, are required to

show that exigent circumstances existed before the item can be seized and held for evidence.[10]

Therefore, the seizing of stolen property on the premises of a pawnshop, which the Tenth Circuit in S & S Pawnshop v. City of Del City, 847 F.2d 432, 436-37 (10th Cir. 1991) had previously held was a closely regulated industry, was appropriate where Landsdown had probable cause to believe that the property was stolen. After Horton, it was not clearly established constitutional law that Landsdown could examine, but not seize the stolen property in question. Therefore, he and the Petitioner Penny are entitled to qualified immunity, and the Tenth Circuit

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[10]In United States v. Johns, 469 U.S. 478 (1985) the Court held that warrantless search of items removed from vehicle three days earlier was permissible where probable cause existed to believe it contained contraband.

was in error when it held that they were not.

CONCLUSION

For the above stated reasons, the Cross-Petitioners respectfully request the Court to grant the Petitioners' cross-petition for a writ of certiorari.

Respectfully submitted,

David W. Lee
LEE, COLLINS & FIELDS, P.C.
818 N.W. 63rd Street
Suite 100
Oklahoma City, OK 73116
(405) 848-1983

ATTORNEY FOR CROSS-PETITIONERS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANNABELLE WINTERS d/b/a SHARP'S PAWN SHOP,	)	
Plaintiff,	)	
vs.	)	No. 90-C-508-E
BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al.,	)	
Defendants.	)	

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate. That Report and Recommendation, filed May 15, 1991, was affirmed by Judge Cook on the grounds that no objections had been filed thereto. Subsequently, it was learned that Plaintiff had not received a copy of the Magistrate's Report and Recommendation. Therefore, Judge Cook vacated his Order Affirming and granted Plaintiff time to file her objections. In the interim, the case has been transferred

to the undersigned. Having reviewed the record and the relevant authorities this Court now affirms the Magistrate's Report and Recommendation in all respects.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is denied; Defendants' Motion for Summary Judgment is granted.

So ORDERED this 10th day of February, 1992.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANNABELLE WINTERS d/b/a SHARP'S PAWN SHOP,	)	
Plaintiff,	)	
vs.	)	No. 90-C-508-C
BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al.,	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE

This report pertains to defendants' Motion for Summary Judgment (Docket #8) [1] and plaintiff's Motion for Summary Judgment (#10). A hearing was held on January 14, 1991, and oral arguments were heard.

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

This action involves a dispute arising out of the Osage County Sheriff's Department's March 9, 1989, search of plaintiff's pawnshop and the seizure and subsequent disposition of a ring located on the premises of this pawnshop. The Plaintiff brings this action to recover for violations of her constitutional rights arising out of the warrantless seizure and the subsequent disposition of this ring without a hearing. Plaintiff also alleges that the Oklahoma statutes requiring a pawnshop to display goods, 21 O.S. § 1092 and 59 O.S. 1508(A), are unconstitutional under the Fourth Amendment to the U.S. Constitution. Plaintiff also claims that the Oklahoma Pawnbroker Act, 59 O.S. § 1515, violates her right to privacy under federal laws, 5 U.S.C. § 522(a) and 12 U.S.C. §§ 3401 et seq.

Defendants allege that plaintiff's claims are barred under the doctrine of

qualified immunity, which grants law enforcement officers immunity from civil liability for discretionary functions if their conduct does not violate the constitutional rights of others. Defendants Wayman, Pinney, Stuart, and Landsdown claim their actions did not violate plaintiff's constitutional rights and therefore they are entitled to qualified immunity. Defendants Osage County and Osage County Sheriff's Office claims that plaintiff has failed to state a claim against them under 42 U.S.C. § 1983. The defendants also allege that the Oklahoma statutes relating to pawnshop activities are not unconstitutional under the Fourth Amendment and do not violate the federal privacy laws cited by plaintiff, 5 U.S.C. § 522(a) and 12 U.S.C. §§ 3401 et seq.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the nonmovant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that

"the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing . . . are not sufficient to establish an issue of fact and defeat the motion." Mckibben v. Chubb, 840 F.2d 1523, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial

Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

In order to state a cause of action under § 1983, plaintiff must show that defendants acted under color of state law in causing the denial of a federally protected right. Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).

Illegal Search and Disposition Claim

Plaintiff first contends that her constitutional rights were violated, under 42 U.S.C. § 1983, by the warrantless seizure and subsequent disposition of a ring from her pawnshop without a hearing. Recently the United States Supreme Court has found that to justify a warrantless seizure: "1) the item must be in plain view; 2) its incriminating character must be immediately apparent; 3) the officer must be lawfully located in a place from which the object can be seen plainly; and 4) the officer must have a lawful right of

access to the object itself". Horton v. California, ___ U.S. ___, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112 (1990).

However, prior to the Horton ruling, courts additionally found that, to satisfy the "plain view" exception to the requirement of a warrant, an officer must inadvertently discover the item. "[W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it", there is no reason not to have a warrant. Collidge v. New Hampshire, 403 U.S. 443, 470 (1971). In Horton the Supreme Court has not applied its ruling in Horton retroactively. Indeed, this court notes that principles of fairness would make such a retroactive application improper. Law enforcement officials should not be burdened with the fear that they will be held in violation of future law when they conform strictly to

the law in effect at the time of the action.

In Wolfenbarger v. Williams, 826 F.2d 930 (10th Cir. 1987), the court established that the "plain view" exception to the requirement of a warrant did not apply to the actions of police officers who, after discovering stolen items in a pawnshop, seized such items without warrant. The court explained that there was no inadvertence, since the officers knew the location of the stolen items and intentionally went to this location for the purpose of seizing such items. The Wolfenbarger court also found that pawnbrokers had substantive and procedural rights in property in their possession, and such property could not be taken without due process.

The Wolfenbarger facts are nearly identical to the facts of this case. Osage County Deputy Landsdown went to the

pawnshop for the express purpose of seizing the stolen ring and, under Wolfenbarger, there was no inadvertent discovery.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would be known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is not merely a defense to liability, but also an immunity from suit protecting a defendant from discovery, trial, and the other burdens of litigation.

A defendant claiming qualified immunity can seek dismissal if a plaintiff has not shown facts that establish that the defendant violated clearly established law. Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988); Mitchell v. Forsyth, 472 U.S. 511,

527-30 (1985). Following a defendant's motion to dismiss, plaintiff must show any additional allegations that the defendant violated clearly established law. Pueblo Neighborhood at 646. The court must then decide if plaintiff has shown facts that would "sustain a conclusion that defendant violated clearly established law." Powell v. Mikulecky, 891 F.2d 1454, 1457 (10th Cir. 1989).

The plaintiff must also demonstrate that the right in question was clearly established at the time of the defendant's conduct. Pueblo Neighborhood at 646. A plaintiff cannot meet this burden merely by identifying a clearly established right and alleging that the defendant violated it. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Unless the plaintiff demonstrates a clearly established right and the necessary factual allegations, the "government official is properly spared the burden and expense of proceeding any further." Powell at 1457.

The law in effect at the time of the seizure was clearly Wolfenbarger and the requirement of inadvertence, which was absent here. With the exception of the inadvertence requirement, the defendants met the requirements for a valid plain view seizure. The ring was in plain view. Under 21 O.S. § 1092 and 59 O.S. § 1508, the officers had a right to view the items in pawn and relevant records of such items. The police officers, knowing of the theft of the ring, on viewing it had probable cause to believe it was stolen and its incriminating nature was immediately apparent. The officers were lawfully in the pawnshop and by statute had lawful right of access to the ring. However,

there was no reason that the officers could not have obtained a warrant to take the ring. Defendants Wayman, Pinney, Stuart, and Landsdown therefore do not have qualified immunity from the suit, as plaintiff has met her burden of showing that they violated clearly established law in effect at the time of the conduct.

As to plaintiff's claim that she was denied her due process rights by the manner in which defendants disposed of the ring, the court in Wolfenbarger stated that pawnbrokers have property rights over items in pawn sufficient to support an action for replevin. Pawnbrokers therefore must be accorded due process in regard to disposition of such goods. The plaintiff received no due process when the ring was seized from her pawnshop and given to the owner without a hearing to determine the true owner. However, this issue is moot at this time, as plaintiff admitted at the

hearing on the Motion for Summary Judgment that the ring was properly given to its true owner.

It is clear from the evidence that plaintiff's due process rights were violated by defendants' seizure of the ring taken from her pawnshop. However, the Supreme Court in Parratt v. Taylor, 451 U.S. 535 (1981), overruled in part on other grounds, 474 U.S. 327 (1986), recognized that post-deprivation remedies made available by the state can satisfy due process requirements. The Court determined that either the necessity of quick state action or the impracticality of providing meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the state's action at some time after the initial taking, can satisfy those requirements. The Court concluded that "[a]lthough the state remedies may not

provide the respondent with all the relief which may have been available if he have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process". Id. at 544. The Court found that the remedies provided by the state could have fully compensated the aggrieved person when a state employee negligently deprived him of his property, and thus they were sufficient to satisfy due process requirements.

In Hudson v. Palmer, 468 U.S. 517, 533 (1984), the Supreme Court went further and held that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of due process if a meaningful post-deprivation remedy for the loss is available.

Oklahoma has made available a meaningful post-deprivation remedy for plaintiff's loss. 22 O.S. § 991a-3.

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[2]Title 22 O.S. § 991a-3 states:

> A. Upon a verdict or plea of guilty or upon a plea of nolo contendere for an offense in which any property is unlawfully obtained and the property is sold, traded, bartered, pledged or pawned, the court may order the defendant to provide restitution to the buyer, recipient or pledgee of the property for the value of any consideration paid, loaned or given for the property unless the buyer, recipient or pledgee has violated the provisions of Section 1092, 1093 or 1713 of Title 21 of the Oklahoma Statutes. Such restitution shall be in addition to any restitution to the victim and shall be in addition to any other penalties provided by law. Restitution to the buyer, recipient or pledgee shall be ordered pursuant to the provisions of subparagraph a of paragraph 1 of subsection A of Section 991a of Title 22 of the Oklahoma Statutes.
>
> B. The buyer of any property which has been unlawfully obtained and which is lawfully returned to its rightful owner shall have the right to bring a civil action against the person who sold, traded, bartered, pledged or pawned the property for the value of any consideration paid, loaned or given for the property

[2] Plaintiff has not disputed the adequacy of the existing state law and admits that she received restitution in the amount of $60.00, which included the amount loaned on the property by plaintiff, plus $10.00 interest. Plaintiff does not argue that Mr. George Ward, who now has possession of the ring, is not the owner of the property. Thus she has been fully compensated for the property under post-deprivation procedures followed by the state. The unauthorized intentional deprivation of her property by state employees does not constitute a violation of procedural due process requirements, as a meaningful post-deprivation remedy for the loss was available.

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unless the buyer has violated the provisions of Section 1092, 1093 or 1713 of Title 21 of the Oklahoma Statutes.

Plaintiff's Motion for Summary Judgment as to her first claim should be denied and defendants' Motion for Summary Judgment as to plaintiff's first claim should be granted.

Constitutional Claims

Plaintiff further contends that 21 O.S. § 1092 and 59 O.S. § 1508(a), which allow police officers the right to view items in pawn and records pertaining to such items, are unconstitutional under the Fourth Amendment. However, in S & S Pawn Shop, Inc. v. City of Del City, No. CIV-87-1457-T (W.D. Okla. Mar. 23, 1989), the Oklahoma court rejected an identical Fourth Amendment contention. The court in S & S Pawn Shop noted that a business operator has a reasonable expectation of privacy with respect to both police searches and administrative inspections, under New York v. Burger, 482 U.S. 691, 699 (1987). However, Burger also carved out an

exception to the business operator's expectation of privacy in closely regulated industries.

The S & S Pawn Shop court found that Oklahoma's pawnshop industry is a closely regulated business, and thus an exception to the expectation of privacy exists. There are extensive statutory provisions regulating pawnshops. See 59 O.S. §§ 1501 et seq. A pawnshop owner is required to obtain a license and a bond, submit to a preliminary investigation, display the license, keep certain records, and make the records and property available for inspection. The fees which a pawnshop may charge are regulated, and the owner is subject to civil and criminal penalties for failure to comply with any of these provisions. In 1988, 59 O.S. § 1515 was passed, which contained additional reporting requirements regarding the identity of sellers and the identity of

property bought or pawned. The S & S Pawn Shop court concluded that these factors all support the conclusion that the pawnshop industry is "closely regulated". This court should conclude, as the Oklahoma district court did, that Oklahoma's pawnshop industry is closely regulated and thus plaintiff's privacy rights are limited.

Plaintiff claims 21 O.S. § 1092 is unconstitutional, as it violates her right to be free from warrantless searches. However, as the court in S & S Pawn Shop pointed out, a warrantless inspection of a closely regulated business is reasonable if three criteria under New York v. Burger, 482 U.S. at 702-703, are met. There must be a substantial government interest that "informs" the regulations pursuant to which the search is made. Second, warrantless inspections must be necessary to further the regulatory scheme. Third, the

inspection program must provide a constitutionally adequate substitute for a warrant, such as a statute advising the owner that the search is being made with a proper scope and limiting the discretion of the inspecting officers.

In S & S Pawn Shop, the judge found that Oklahoma's pawnshop statutes serve two purposes. Many of the provisions regulate lending practices of pawnshops. Other provisions, particularly 59 O.S. §§ 1508 and 1515 and 21 O.S. § 1092, appear to be designed, at least in part, to regulate receipt of stolen property. Section 1508 provides for warrantless inspections of records and property, section 1515 requires that descriptions of property received and the identity of sellers or pledgers be reported to law enforcement agencies, and section 1092 provides criminal penalties for failure to display property to owners or law enforcement officers.

The judge in S & S Pawn Shop noted that Oklahoma has a substantial interest in controlling property theft, and that interest is served by regulating pawnshops, as the very nature of the pawn business provides an opportunity to sell stolen property. The court also found that warrantless inspections were necessary. Because the statute only requires a ten-day waiting period between receipt and sale by the pawnshop, property may pass quickly through a pawnshop. Frequent, unannounced inspections are required to ensure compliance with the statutes and to detect stolen property. The court also found that § 1508 provides a constitutionally adequate substitute for a warrant, as it advises pawnshop owners that inspections will be conducted, provides that records kept and property received are subject to inspection, and identifies authorized inspectors. The statute provides for

inspection "at any reasonable time", a time provision approved by the United States Supreme Court in United States v. Biswell, 406 U.S. 311 (1972). Although the statute did not limit the time of inspections to regular business hours, the Court found that this did not render it unconstitutional, as there were no allegations that inspections have been conducted during non-business hours.

This court should conclude, as the court did in S & S Pawn Shop, that Oklahoma's pawn shop statutes allowing warrantless inspections are no unconstitutional, as they meet the criteria of New York v Burger. Plaintiff's Motion for Summary Judgment as to her second and third claims should be denied and defendants' Motion for Summary Judgment as to plaintiff's second and third claims should be granted.

Privacy Law Violations

Plaintiff finally contends that the Pawnbrokers Act, 59 O.S. § 1515(a), violates the federal Privacy Act, 5 U.S.C. § 522(a) and the Right to Financial Privacy Act, 12 U.S.C. § 3401, et seq. However, the Privacy Act was intended to prevent the disclosure of government information regarding individuals by federal agencies. Thomas v. United States Dept. of Energy, 719 F.2d 342, 345-46 (10th Cir. 1983). The Right to Financial Privacy Act was enacted to allow government authorities to obtain financial records from banks and other financial institutions. Nichols v. Council on Judicial Complaints, 615 P.2d 280, 283 (Okla. 1980). Neither law pertains to disclosure of information by pawnbrokers.

Plaintiff's Motion for Summary Judgment as to her fourth claim should be denied and defendants' Motion for Summary

Judgment as to plaintiff's fourth claim should be granted.

Summary

In summary, defendant's Motion for Summary Judgment (#8) should be granted as to all of plaintiff's claims, and plaintiff's Motion for Summary Judgment (#10) should be denied as to all of her claims.

Dated this 15th day of May, 1990.

Winters\Appendix A